Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF LOUISIANA,
Department of Transportation and Development,

Petitioner,

v.

ROBERT DOWELL, SR., Individually and as Tutor of the minor, QUONTAVIUS TRE'VEON DOWELL, and DEBRA MARIE BELL,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This writ application requests that the Supreme Court address the interpretation of two federal statutes aimed at promoting highway safety, 23 U.S.C. § 409 and 23 U.S.C. § 402(k)(1).

Both statutes seek to limit the use in tort litigation of records and reports that were collected or compiled for the purpose of identifying possible highway problems. Neither statute has been the subject of comment by this Honorable Court.

The questions presented for review are:

1. Does 23 U.S.C. § 409 prevent accident reports compiled and collected by the State for the purpose, among others, of identifying and evaluating highway safety problems from being discovered, admitted, or otherwise used in a suit for damages against the State?

2. Similarly, does 23 U.S.C. § 402(k)(1) prevent accident reports compiled and collected in accordance with federal mandates for the purpose of identifying and evaluating highway safety problems from being discovered, admitted, or otherwise used in a suit for damages against the State?

3. If so, do the prohibitions presented by either or both of these statutes extend to prevent the use as evidence or for any other purpose the testimony of individuals identified solely through those reports and does this prohibition extend to

QUESTIONS PRESENTED FOR REVIEW – Continued

prevent the use of the testimony of individuals identified solely through that correspondence? and

4. Are construction diaries of a federally funded highway improvement safety program encompassed within the evidentiary bar provided by 23 U.S.C. § 409?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page except for:

The City of Shreveport

Balar Associates

All other defendants have been dismissed as parties after settlement.

This petition for a writ of certiorari is filed on behalf of the State of Louisiana, Department of Transportation and Development, thus the corporate disclosure statement required by Rule 29.6 is inapplicable.

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The April 20, 2000, denial of petitioner's writ of certiorari by the Supreme Court of Louisiana is reported at 2000-CC-0685 (La. 4/20/00), ___ So.2d ___, 2000 WL 550993 (La. April 20, 2000) and is attached as Appendix C to this petition, p. App. 20. The February 1, 2000, opinion of the Louisiana Court of Appeal, Second Circuit is reported at 33,095 (La.App. 2 Cir. 2/1/00), 750 So.2d 498, and is reprinted at Appendix A to this petition, p. App. 1. The July 28, 1999, judgment of the First Judicial District Court, Parish of Caddo, State of Louisiana, is unreported and is reprinted at Appendix B to this petition, p. App. 13.

STATEMENT OF JURISDICTION

The denial of petitioner's writ of certiorari by the Supreme Court of Louisiana was rendered on April 20, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

FEDERAL STATUTES

1. 23 U.S.C. § 409 Discovery and admission as evidence of certain reports and surveys

   "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident

sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

2. 23 U.S.C. § 402 Highway safety programs

23 U.S.C. § 402 and § 402(k)(1) provide, in part:

"§ 402. Highway safety programs

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom . . . *The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States* ***shall*** *collect and report such data as the Secretary may require.* The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs. *The program shall provide for annual reports to the Secretary on the efforts being made by the States in reducing deaths and injuries occurring at* ***highway construction sites*** *and the effectiveness and results of such efforts. The Secretary* ***shall*** *establish minimum reporting criteria for the program. Such criteria* ***shall*** *include, but not be limited to, criteria* on deaths and injuries resulting from police pursuits, school bus accidents, and speeding, *on traffic-related*

deaths and injuries at ***highway construction sites*** and on the configuration of commercial motor vehicles involved in motor vehicle accidents . . . *In addition such uniform guidelines* ***shall*** *include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths,* vehicle registration, operation, and inspection, *highway design and maintenance (including lighting, markings, and surface treatment), traffic control,* vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light trucks as necessary to improve highway safety, and emergency services . . .

* * *

"(k)(1) Subject to the provisions of this subsection, the Secretary shall make a grant to any State which includes, as part of its highway safety program under § 402 of this title, the use of a comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety recordkeeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary under this section. ***Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages***

arising out of any matter mentioned in such report, list, schedule, or survey. *(Emphasis supplied)*

(The full text of 23 U.S.C. § 402 is reprinted as Appendix D to this petition, p. App. 21)

STATEMENT OF THE CASE

This suit arises out of a tragic automobile accident that occurred on July 17, 1997, as the teenage children of Robert Dowell and Marie Bell were leaving work and attempting to exit an amusement park in Shreveport, Louisiana. At that time, at the main exit for the amusement park, there was an on-going federal/city highway improvement project to widen the roadway. As the teenagers pulled out of the exit, their car was struck broadside by another vehicle. One child died at the scene; the other died nine months later, never having regained consciousness.

Plaintiffs, the tutor of a surviving child of one of the teenagers and the parents of the other, sued the amusement park, the primary contractor on the project, a subcontractor, the firm that designed the project, the City of Shreveport, and the State of Louisiana, Department of Transportation and Development, which was administering the project in accord with state and federal law. The allegations were that the placement of barrels during construction so affected the ability of cars to safely exit the amusement park that it created an unreasonably dangerous condition.

As part of the discovery process, plaintiffs sought to depose the individuals involved in three previous accidents alleged to have occurred under similar circumstances and those officers that had investigated those accidents. The plaintiffs have conceded that the identities of these individuals were made known to the plaintiffs solely through the copies of the accident reports that they had obtained through one of the plaintiffs, a City of Shreveport police officer.

Plaintiffs additionally sought to depose the authors of certain correspondence between the amusement park, the city, and the state and private individuals. Again, plaintiffs have conceded that the identities of those individuals were discovered by them solely through a review of correspondence maintained by the City of Shreveport that they had obtained through unknown means.

A further request was made for the production of the construction diaries maintained by the State for the project.

After a lengthy hearing and the submission of numerous depositions of various state officials, the trial court granted the State's request for a protective order, finding the accident reports, correspondence, and construction diaries were not subject to discovery or to otherwise be used in this suit for damages pursuant to 23 U.S.C. § 409. It further found, that as the sole source of the plaintiffs' identification of the witnesses sought to be deposed was from the accident reports and the correspondence, to allow the testimony of those witnesses would be to circumvent the intent of § 409.

The trial court did not discuss the impact of 23 U.S.C. § 402(k)(1) on the accident reports and the testimony being sought.

Plaintiffs sought writs with the Louisiana Second Circuit Court of Appeal and on February 1, 2000, that court reversed, in part, ruling that the accident reports and construction diaries were not within the scope of § 409. It further ruled that even though the correspondence was within § 409's scope, § 409 did not prevent the testimony of the non-governmental authors of the correspondence although it would prevent the testimony of the governmental recipients of that correspondence or the admission of that correspondence. (Apparently, even though the sole source of the plaintiffs obtaining the witnesses' identities was the correspondence, the court of appeal would allow those witnesses to testify but the governmental recipients could not testify about their receipt of the correspondence or their actions or response.)

The appellate court ignored and did not discuss the impact of 23 U.S.C. § 402(k)(1) on the accident reports and the testimony being sought even though that statute and the testimony of various State officials, including that of the Executive Director of the Louisiana Highway Safety Commission, had been submitted at the trial court and was briefed in detail in response to plaintiffs' writ request.

The State sought writs with the Louisiana Supreme Court. That court denied writs without comment on April 20, 2000. p. App. 20

This writ application follows.

REASONS FOR GRANTING THIS WRIT

This writ involves the interpretation of two federal statutes that raise important federal questions, i.e., the preemption of state discovery statutes by federal legislation and the scope intended by the federal government in their efforts at that preemption. To leave this matter to interpretation by the various lower courts without guidance by this Honorable Court is to invite a random and inconsistent result. It is respectfully suggested that the decision of the state appellate court in this case reflects a discretionary randomness of interpretation that circumvents the clear intent of Congress as expressed in the two statutes.

As neither of these two statutes have been subjected to any review by this Honorable Court, this writ should be granted on that basis alone.

However, in further support of why this writ should be granted, the Eastern District Louisiana federal court ruled in May, 1998, that both § 409 and § 402(k)(1) were constitutional restrictions by federal legislation on the State of Louisiana's discovery statutes and that accident reports and the accident histories generated by the compilation of those reports were within the ambit of both § 409 and § 402(k)(1). See *Gaubert v. Denton*, (E.D. La. May 28, 1999), 1999 WL 350103.

As such, there exists a conflict between the interpretation of a federal statute by a federal court and by a

state court. This conflict should be resolved by this Honorable Court.

1. **Petitioner's writ of certiorari should be granted because the Louisiana Second Circuit Court of Appeal was incorrect in interpreting 23 U.S.C. § 409 to allow accident reports compiled and collected by the State for the purpose, among others, of identifying and evaluating highway safety problems from being discovered, admitted, or otherwise used in a suit for damages against the State. This interpretation is one of an important federal question and is in conflict with decisions of other courts and has not been ruled upon by this Honorable Court.**

The State established in the Trial Court that the accident reports are protected from discovery by § 409 and by § 402(k)(1).

In conjunction with the hearing on the State's request for a protective order evidence was received from Pamela S. Bowman, Financial Manager, Louisiana Division Office, Federal Highway Administration, Department of Transportation, United States of America; Colonel James Edwin Champagne, Executive Director, Louisiana Highway Safety Commission, and the State of Louisiana representative to the United States Government for highway safety; Charles H. Miller, Jr., Traffic Records Coordinator for the Louisiana Highway Safety Commission; Daniel Magri, Traffic Safety Engineer, Hazard Elimination Funds Coordinator, DOTD; Fred Borne, Jr., Highway Needs Analyst and Engineer, DOTD; Harrison J. Hannon, Jr., District Construction Engineer, District 04, DOTD; Walter

Eugene Reed, District Traffic Operations Engineer, District 04, DOTD; Don Randall Maddox, District Design Supervisor, District 04, DOTD; Michael Erlund, City Traffic Engineer, City of Shreveport; Robert Westerman, Assistant City Engineer, City of Shreveport.

No evidence was introduced by the plaintiffs.

The evidence established that the project that was ongoing at the time of this accident involved the use of federal funds for safety improvements and intersection improvements to East 70th Street in Shreveport, Caddo Parish, Louisiana, and that it was identified as Federal Aid Project No. STPN-15-01(019).

All traffic accidents investigated by any police department in the State of Louisiana, including city police, parish deputies, or state troopers, are reported on the Uniform Motor Vehicle Traffic Accident Report. In turn, copies of these reports are forwarded on a periodic basis to the Louisiana Highway Safety Commission.

After receipt, the Highway Safety Commission forwards the reports to the Hazard Elimination Funds Coordinator's office at the DOTD for "spotting," that is for the coding of the report to a particular highway and system and to a specified milepost within that system. These reports are then returned to the Highway Safety Commission which then inputs the information contained on the reports into a computer program.

The Uniform Motor Vehicle Traffic Accident Report is in actuality a compilation of 140 separate data fields. And again, the information contained on the accident report

form is the sole crash information source for that comprehensive computer program.

On a periodic basis, the Highway Safety Commission forwards back to the Hazard Elimination Funds Coordinator's office the tape program, containing all the inputted information from the reports it had received and the tape programs provided by the several municipalities.

The Hazard Elimination Funds Coordinator's office then combines that tape program with other computer programs maintained by his office which have the geometrics and design features of the various highways, including the type of roadway, surface descriptions, traffic counts, and whether the road is urban or rural. Utilizing this information, this combined program is then asked to produce a listing of accident locations for various categories (two-lane, four-lane, four-lane divided and freeway sorted by both urban and rural and at intersections, roadway sections, and spot locations) for each of the nine DOTD districts in the state.

This database is an historic database; that is, it is continually being updated and reflects the complete accident history for a particular highway location.

If the computer generated report indicates an abnormally high number of accidents in any of the categories at a certain location, a listing is provided to the District Administrator for each district and he is asked to study the top three for each category.

The District Traffic Operations Engineer then evaluates the location by various means, including inspection and a review of any information contained within their

local files regarding the location. This information may include any correspondence the DOTD may have received regarding the location from any source, any correspondence it may have generated regarding the location, any complaints that it may have received regarding the location, any engineering studies that may have been requested or conducted regarding the location, and the accident history at or near the location.

If it is determined that a problem does exist at a location and it can be addressed locally, district DOTD resources may be utilized. This may include signing or maintenance. However, if the problem must be addressed by a signal upgrade or by an intersection improvement, or otherwise by means best handled at the state level, it is forwarded back to the state level to determine if it is eligible for the Hazard Elimination Program (23 U.S.C. § 152) administered by the Hazard Elimination Funds Coordinator's office.

If the proposed project cannot meet the criteria for the use of § 152 funds or if the funds appropriated for that year have been previously committed, the Hazard Elimination Funds Coordinator's office will forward the proposed project to the Highway Needs office for evaluation to meet other federally funded programs.

Almost without exception, every DOTD project is funded in part by federal funds. The Highway Needs office is responsible for allocating those projects among the various federal programs that have been made available to the state.

Among the Federal-aid highway programs is the "33C" program which consists of Federal-aid highway

funds made available to urban areas with populations greater than two hundred thousand. Those areas can request funding for certain projects within their urban limits. The requests and project proposals are submitted by those urban areas to the DOTD to determine that justification exists for the proposed project within the guidelines for the use of those funds. Once justification is made, the project is then administered by the DOTD.

The justification process includes a review by various offices of the history and geometrics of the location, including accident history, existing design criteria, and relevant correspondence and other documentation regarding the location.

As indicated above, the construction project was funded by the use of "33C" Federal-aid highway funds provided by the federal government under 23 U.S.C. § 133. The city caused to be developed the original design plan for the improvements to be made to East 70th Street that included the location of this accident. This proposed project was then submitted to the DOTD where it was determined to meet the criteria for expenditure of the "33C" funds.

The testimony of the District Traffic Operation Engineer indicated that as part of his duties he will receive, through his district administrator, lists from the Hazard Elimination Funds Coordinator's office of different locations that should be studied for possible hazards and the elimination thereof. As part of his evaluation of those locations his office would inspect their files on that location and review any correspondence regarding any problems or complaints that might have been received or

recommendations that might have been made in the past or other records that might be contained therein. As part of that review, they would also look at all other pertinent information including accident history and perform studies that would include traffic count and the geometrics at a particular location.

After conducting his review, the District Traffic Operation Engineer may then make a recommendation for safety improvements at that location. This recommendation, depending upon its nature, may go back to the Hazard Elimination Funds Coordinator's office, other offices at the headquarters level, or to the district design engineer's office.

In the process of doing design projects, the District Design Supervisor's office is required on federally funded projects to put out a design report. Part of that design report is a list of the accidents that occurred at a particular job location, and depending on the funding requirements, an abnormal accident list which shows a higher rate of accidents at that particular location.

In addition, the District Design Supervisor's office asks for the District Traffic Engineer's recommendation as far as any improvements he sees needs to be done on that section of highway. Further, when the District Design Supervisor's office makes a request for a Federal-aid project, it coordinates with the District Traffic Operation Engineer and the District Traffic Operation Engineer will examine his files that are maintained on each section of roadway in the district. The District Traffic Operation Engineer will then list for the District Design Supervisor's office the lists of complaints that have come in

and the recommendations that have been made to resolve those complaints.

In further explanation, the District Design Supervisor testified that the Federal Highway Administration has certain things it requires the state do to obtain federal funds. Part of that obligation is to prepare the design report, check the existing roadway against the current standards that the DOTD has for different classifications of roadways to see where the existing roadway may be lacking, and then make a recommendation as to what can be accomplished within the type of project that is being proposed.

In some cases the problem cannot be eliminated due to the type of funding that is being requested and a design exception must be requested that can only be approved by the Chief Engineer for the State of Louisiana and the federal government.

In agreement with the Highway Needs office, the District Design Supervisor testified that the approximate percentage of federal funds involved in highway safety improvement projects varies. The overlay program for state roadways is approximately a hundred and sixty million. Ninety percent of that is Surface Transportation Programs (STP) funds. The National Highway System (NHS) routes are almost entirely federally funded.

Further, the District Design Supervisor testified that the accident history listing is a continuous list that never stops.

The District Design Supervisor also testified regarding the inspection reports that would be maintained on a

federally funded highway project and indicated that such reports are required to be maintained and serve as backup documentation for plan changes or other alterations that might involve a change in the amount of federal funds involved in highway safety improvement project.

The Traffic Engineer for the City of Shreveport testified that his office performs most of the studies regarding citizen concerns within the city as they relate to traffic engineering.

As part of the records maintained by the Traffic Engineer there is a file that contains information relating to the location of this accident. Maintained within that file would be everything that happened in regards to traffic engineering, studies that would have been done in relation to safety, complaints, and requests for traffic control devices. The importance of maintaining that correspondence as to complaints and requests for traffic control devices is that when the city conducts a safety enhancement study that information is used to identify locations and then make a decision and recommendations to the city's engineering division. Additionally, the city maintains records concerning the average daily traffic volume at a certain location as any traffic study that is conducted begins with a twenty-four hour traffic count. The same is done for accident reports, again serving as the basis for beginning safety enhancement programs. After having used the information and determining that a safety enhancement program is applicable, the Traffic Engineer then makes a recommendation and forwards the recommendation to engineering for a capital project utilizing federal or state funds.

The Assistant City Engineer testified that his office also maintains a file regarding the location of this accident and that in this file are correspondence or memos regarding complaints or requests for traffic control devices for that section of East 70th Street. These documents are maintained as data involving situations that should be considered for safety improvement on a capital improvement project.

On the particular construction project that was ongoing at the time of the accident, funds were a combination of city and Federal-aid highway funds. Further, the information referred to previously, the correspondence, everything that happened in regards to traffic engineering, studies that would have been done in relation to safety, complaints, requests for traffic control devices, traffic volume, and accident reports, was used in this project and was necessary to obtain federal funding.

Subsequent to the complained of accident, a decision was made by the City of Shreveport to request a plan change to relocate the intersection of Hamel's Park Drive and East 70th Street. This decision was based in part upon the data that would have come from any traffic accident reports and the additional information from the traffic engineering division that was used earlier to provide justification for the project. Federal funds were obtained and used for the relocation of the intersection of Hamel's Park Drive and East 70th Street.

The District Construction Engineer oversaw the construction of this project and testified that subsequent to the accident in this case the City of Shreveport contacted him and requested a plan change moving the intersection

of Hamel's Park Drive and East 70th Street. As part of his justification for the plan change, the District Construction Engineer reviewed the previously described correspondence maintained in the District Traffic Operation Engineer.

The appellate court recognized that 23 U.S.C. § 409 was enacted to preclude from discovery and evidence any report, survey, schedule, list, or data collected or compiled for developing any highway safety construction improvement project which may be implemented with Federal-aid funds and, that in matters relating to the discovery of material protected by § 409, the Louisiana discovery procedures were pre-empted by the federal statute, citing *Wiedeman v. Dixie Electric Membership Corporation*, 627 So.2d 170 (La. 1993). This was in keeping with the Louisiana Supreme Court decision in *Reichert v. State, DOTD*, 94-1419 (La. 5/20/97), 694 So.2d 193:

> "The purpose of § 409 is to '[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions.' " at 197.

However, the appellate court then interpreted § 409 contrarily to the *Reichert* court's note that § 409 was amended to include the words "or collected" after "compiled" to effectively eliminate the admissibility of "**accident reports**, traffic counts, and other raw data collected by the Department" allowed by the holding in *Wiedeman v. Dixie Electric Membership Corporation, supra.* This clarification was added in response to state court decisions,

like *Wiedeman*, that in the view of Congress, misinterpreted the term "data compiled."[1]

Indicative of the need for this Honorable Court's granting of this writ is that the appellate court's decision was also in direct conflict with a more recent Louisiana Supreme Court decision in *Palacios v. Louisiana and Delta Railroad, Inc.*, 98-2932 (La. 7/2/99), 740 So.2d 95, wherein that Court held that accident reports for accidents occurring at a railroad crossing were protected from discovery and use under § 409.

The appellate court's decision was also in direct conflict with the decision of the Louisiana First Circuit Court of Appeal's decision in *Sevario v. State ex rel. Dept. of Transp. and Development*, 98 1302 (La.App. 1 Cir. 11/10/99), 752 So.2d 221, *writ denied*, 1999-3457 (La. 4/7/00), ___ So.2d ___, 2000 WL 383007, which had involved an identical issue involving accident reports and wherein many of the same witnesses had testified.

The appellate court's decision was also in direct conflict with the decision of the Eastern District of Louisiana in *Gaubert v. Denton*, (E.D. La. May 28, 1999), 1999 WL 350103, where such accident reports were clearly considered by Judge Clement to be within § 409's ambit.

Further conflict is found in the disparate result reached by lower courts in other states. Compare, i.e., a finding that accident reports were within the scope of § 409 in *Coniker v. State*, 181 Misc.2d 801, 695 N.Y.S.2d 492, 1999 N.Y. Slip Op. 99425 (N.Y.Ct.Cl. Jul 26, 1999) with the

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[1] See U.S. House Report No. 104-246, Sec. 328.

decision in *Guillen v. Pierce County*, 96 Wash.App. 862, 982 P.2d 123 (Wash.App. Div. 2 Aug 06, 1999), *review granted*, 139 Wash.2d 1015, 994 P.2d 847 (Wash. Jan 05, 2000), that accident reports were not within § 409's scope.

As this is a federal statute, is the conflicting interpretation to be on a state by state, court by court basis?

2. Similarly, petitioner's writ of certiorari should be granted because the Louisiana Second Circuit Court of Appeal was incorrect in failing to address and recognize that 23 U.S.C. § 402(k)(1) also prevents accident reports compiled and collected in accordance with federal mandates for the purpose of identifying and evaluating highway safety problems from being discovered, admitted, or otherwise used in a suit for damages against the State. This interpretation is one of an important federal question and is in conflict with decisions of other courts and has not been ruled upon by this Honorable Court.

The appellate court completely failed to address the effect of 23 U.S.C. § 402(k)(1). That federal statute is specifically directed at accident reports and even has a specific notation that reports of accidents in construction zones are within its scope. Indeed, the only court that appears to have even addressed the § 402(k)(1) issue is the *Gaubert, supra*, court. And as noted above, the appellate court's decision directly conflicts with that decision on the same point.

Testimony at the hearing established that the Louisiana Highway Safety Commission is given many responsibilities but the most prominent one is to utilize crash

information to develop programs that are designed to reduce Louisiana's traffic crash problems.

23 U.S.C. § 402(a) provides the mandatory establishment of a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the states. Under such program, the states **shall** collect and report such data as the Secretary of the Department of Transportation may require.

Colonel Champagne, the Executive Director of the Louisiana Highway Safety Commission, testified that § 402 is the method by which federal funds are provided to the state for that purpose and that the sole source of the traffic crash information required to be maintained by § 402 and § 402(k)(1) is the accident report form.

23 U.S.C. § 402(k)(1) has not been the subject of court evaluation as has § 409. To prevent the inconsistent and conflicting interpretations that have occurred regarding § 409, this Honorable Court should grant this writ.

3. Petitioner's writ of certiorari should be granted because the Louisiana Second Circuit Court of Appeal was incorrect in not recognizing that the prohibitions presented by either or both of these statutes extends to prevent the use as evidence or for any other purpose the testimony of individuals identified solely through those reports and extends to prevent the use of the testimony of individuals identified solely through that correspondence. This interpretation is one of an important federal question and is in conflict with decisions of other courts and has not been ruled upon by this Honorable Court.

Petitioner asserts that if this Court determines that the accident reports and correspondence are protected

under § 409 the use of the individuals' testimony whose identities were revealed through the reports and correspondence would be similarly protected as being a product of an improper use of the protected reports and correspondence.

Witnesses should not be allowed to circumvent § 409 by testifying regarding the contents of an inadmissible document.

The decision of the appellate court conflicts with the result reached in *Harrison v. Burlington Northern Railroad Company*, 965 F.2d 155 (7th Cir. Ill. 1992) wherein that court noted that allowing the witnesses to testify as to the content of letters would have circumvented the purposes of § 409.

The decision of the appellate court further conflicts with *Shots v. CSX Transportation, Inc.*, 887 F.Supp. 204 (S.D. Ind. 1995) wherein that court in granting a request for a protective order that would deny the taking of deposition testimony regarding § 409 documents noted:

> "The plaintiff in *Harrison* (*Harrison v. Burlington Northern Railway Co.*, 965 F.2d 155 (7 Cir. 1992)) further argued on appeal that the trial court erred in additionally excluding testimony from the authors of the 23 U.S.C. 409 documents. The Seventh Circuit rejected this argument, adopting the holding of the trial court:
>
> '409 is, in effect, a congressional direction that if a project conceivably could be financed by federal funds as this one could have been, that in the interest of getting the job done, they don't want official reports being something that railroads have to be concerned about in personal

> injury cases, or that the investigator has to have that in mind when he is making a report. . . . If [the report is] not admissible, then having somebody get on the stand and testify to it, I don't think I can duck the statute that way.' *Id.*, at 160.
>
> "The Seventh Circuit went on to adopt the following language from *Robertson v. Union Pac.R.R.*, 954 F.2d 1433, 1435 (8th Cir.1992):
>
> 'Other courts have recognized that the underlying intent of the statute is to "facilitate candor in administrative evaluations of highway safety hazards," and to prohibit federally required record-keeping from being used as a "tool . . . in private litigation." ' "

Significantly, the appellate court's decision is in direct conflict with *Sawyer v. Illinois Central Gulf Railroad Company*, 606 So.2d 1069 (Miss. 1992), where the Mississippi Supreme Court in upholding a trial court's denial of the plaintiff's attempt to call witnesses to testify to the contents of documents which were privileged under § 409 noted:

> "Sawyer concedes 'that the hazard rank inventory and the letter of September 11, 1984, were generated in the process of developing a highway safety construction improvement project using federal aid highway funds.' (Brief of Appellant, filed May 25, 1990, p. 30) He nevertheless argues that the letter and inventory should have been admitted to approve (sic) notice to ICG of the dangerousness of the crossing. Failing that, and while conceding that the letter of September 11, 1984, and the hazard rank inventory fall within the litany of types of protected documents, *Sawyer argues the statute*

says nothing about testimony. He urges a literalistic reading of the statute, to exclude the actual documents, but allow witnesses to testify to their contents. This argument is specious. Sawyer cites no authority supporting it, and we suggest this is because there is none." (*Emphasis supplied*) at 1073.

In the instant case, to allow the plaintiffs to take and to base their case on such testimony clearly violates the intent of § 409's protection by allowing testimony about the contents of the documents when the actual documents are protected. It is further suggested that it would be equally violative of § 402(k)(1).

4. Petitioner's writ of certiorari should be granted because the Louisiana Second Circuit Court of Appeal was incorrect in not recognizing that construction diaries of a federally funded highway improvement safety program are encompassed within the evidentiary bar provided by 23 U.S.C. § 409. This interpretation is one of an important federal question and is in conflict with decisions of other courts and has not been ruled upon by this Honorable Court.

The testimony adduced by the state and the city at the requested hearing clearly established that the inspection reports were either maintained in accordance with the requirements of federal law for federal projects, appropriately the documentation for the approval of projects utilizing other Federal-aid funds, and even actually used in the development of this project and its plan changes.

The decision of the appellate court conflicted with earlier interpretations of § 409 by that same court. Inspection records were determined to be clearly within the ambit of § 409 in *Fry v. Southern Pacific Transportation Co.*, 30,540 (La.App. 2 Cir. 6/24/98), 715 So.2d 632, *writs denied*, 98-1986 (La. 10/30/98), 727 So.2d 1170, where the appellate court had held that:

> "Applying these precepts here, we conclude that the lower court erred in allowing the on-site inspection report into evidence. This exhibit, like much of the copious documentation presented by plaintiffs regarding the timeliness of the upgrade process, contains a preliminary survey of the Southern Pacific/Stagecoach Road crossing, along with recommendations and impressions rendered in that inspection. As noted by our supreme court, § 409's exclusion of such information protects the public by ensuring that safety measures are routinely explored by administrators. *Reichert, supra.*" at 637.

The appellate court further conflicts with an earlier decision of the Louisiana First Circuit Court of Appeal in *Hardenstein v. Cook Construction, Inc.*, 96-0829 (La.App. 1 Cir. 2/14/97), 691 So.2d 177, *writ denied*, 97-0686 (La. 4/25/97), 692 So.2d 1093. There the First Circuit noted:

> "The highway construction project which was under way on I-12 when this accident occurred was partially financed with federal highway funds, and the inspection report at issue was an evaluation of the progress of that ongoing project. As such, DOTD argued – and the trial court agreed – that the provisions of § 23 U.S.C.A. 409 were applicable to shield it from admission into evidence in this case.

* * *

"Applying these standards to the inspection report prepared by an engineer employed by the Federal Highway Administration, we find no error in the trial court's exclusion of that document. The report was an evaluation of an ongoing highway safety construction improvement project which used federal highway funding. It was more than 'raw data,' because it also contained the opinions and recommendations of the inspector. Accordingly, the trial court was correct in concluding it could not be admitted." at 182.

The appellate court decision also conflicts with *Reynolds v. City of New York*, 254 A.D.2d 159, 679 N.Y.S.2d 372, 1998 N.Y. Slip Op. 09033 (N.Y.A.D. 1 Dept. Oct 22, 1998), wherein that court found that inspection reports on a federally-funded project were within § 409's scope.

CONCLUSION

Petitioner shows that the granting of this writ is proper as the questions at issue involve the interpretation of federal statutes that have not been subject to the previous review of this Honorable Court. Pending such review, the lower courts have interpreted the statutes in an inconsistent and conflicting manner and have failed to recognize and enforce congressional intent.

Respectfully submitted,

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APPENDIX A

Court of Appeal of Louisiana,
Second Circuit.

Robert DOWELL, Sr., et al., Plaintiffs-Applicants,

v.

STATE of Louisiana through DEPARTMENT OF TRANSPORTATION & DEVELOPMENT, et al., Defendants-Respondents.

Debra Marie Bell on Behalf of the Estate of her minor child, Devon Dowell-Thomas, Plaintiffs-Applicants,

v.

Plaquemine Contracting Corp., et al., Defendants-Respondents.

Nos. 33094-CW, 33095-CW.

Feb. 1, 2000.
Writs Denied April 20, 2000.

Morrow, Morrow, Ryan & Bassett by Jeffrey M. Bassett, P. Craig Morrow, Jr., Opelousas, Counsel for Plaintiffs/Applicants, Robert Dowell, Sr., et al.

Joseph Greenwald, Shreveport, Counsel for Plaintiff/Applicant, Debra Marie Bell.

Richard P. Ieyoub, Attorney General, James R. Dawson, Assistant Attorney General, Counsel for Defendant/Respondent, State, DOTD.

Abrams & Lafargue by Julie M. LaFargue, T. Clayton Simmons, Shreveport, Counsel for Defendant/Respondent, City of Shreveport.

Cook, Yancey, King & Galloway by Sidney E. Cook, Jr., Shreveport, Counsel for Defendant, Plaquemine Contracting.

Lunn, Irion, Johnson, Salley & Carlisle by Charles W. Salley, Shreveport, Counsel for Defendant, S.J. Entertainment, d/b/a Hamel's Amusement Park.

Atkinson, Perry, Atkinson & Balhoff by Joseph W. Mengis, John W. Perry, Jr., Baton Rouge, Counsel for Defendant, Construction Safety Products.

Before BROWN, WILLIAMS and GASKINS, JJ.

BROWN, J.,

In this action for damages arising out of a vehicular accident which occurred at a construction site, the trial court granted protective orders limiting plaintiffs' discovery efforts. At plaintiffs' request, we agreed to review that decision under our supervisory power. The question is whether the prohibition found in 23 U.S.C. § 409 against disclosure or use of information gathered to evaluate potential highway accident sites and hazardous roadways bars: 1) deposing witnesses who were either involved in prior accidents at the same location or who complained about the intersection; 2) the production of correspondence relating to the intersection; and 3) daily construction diaries and inspection reports. While recognizing that section 409 preempts state law, we find that most of the excluded discovery did not fall within the scope of the federal bar or privilege. We reverse in part and remand the matter for further proceedings consistent with this opinion.

Facts

This action arises out of an automobile accident which occurred on July 11, 1997 at the intersection of Hamel's Park Drive and East 70th Street in Shreveport, Louisiana. At that time, construction was in progress to upgrade or make safer the intersection. On the evening of July 11th, 20-year-old Robert Dowell, Jr., and his 16-year-old sister, Devon Dowell-Thomas, were leaving Hamel's Amusement Park where they were employed for the summer. Robert was driving and as his vehicle entered the intersection, it was struck by an oncoming automobile driven by Robby McGee. Both Robert and his sister were killed as a result of the accident.[1] Wrongful death and survival actions were brought against defendants[2] by surviving family members.[3] Plaintiffs alleged that the negligent placement of signs and construction barrels and/or barricades was a cause of the accident. Following the Dowell accident, at the request of the City of Shreveport,

---

[1] Robert died eight months afterwards from injuries received in the accident. His sister Devon was pronounced dead on arrival at the LSU Medical Center.

[2] Named as defendants were Plaquemine Contracting Company, the project's general contractor; Construction Safety Products, a subcontractor responsible for the placement of barrels and signs during construction; S.J. Entertainment, the operator of Hamel's Park; the State of Louisiana through the Department of Transportation and Development; and, the City of Shreveport.

[3] Robert's mother, Brenda Dowell Mayweather, and Robert Dowell, Sr., as the parent of both Robert and Devon and on behalf of Robert's young child brought an action. Debra Marie Bell filed an action on behalf of her minor child, Devon. The cases were consolidated.

the construction project was changed to move the intersection further west.

In discovery, plaintiffs submitted various interrogatories, requests for production of documents and notices of depositions. Because federal funds were used in the construction project, both the State and the City sought protective orders under 23 U.S.C. § 409, which prohibits the discovery and admissibility of certain documents and information compiled and collected for the purpose of developing projects to improve highway safety.

Applicable Legal Principles

Under Louisiana law, parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter of the action. La. C.C.P. art. 1422; *Long v. State, Department of Transportation and Development*, 32,124 (La.App.2d Cir.08/18/99), 743 So.2d 743, writ denied, 99-2956 (La.12/17/99), 751 So.2d 885. Furthermore, evidence which is relevant is generally admissible. La. C.E. art. 402. With regard to certain highway safety information, however, Louisiana's law is preempted by federal law. *Wiedeman v. Dixie Electric Membership Corp.*, 627 So.2d 170 (La.1993); *Long, supra*. Noting that preemption is never presumed, the supreme court in *Wiedeman, supra* at 172, emphasized that the applicable federal provisions would be construed restrictively to prohibit only what is expressly proscribed.

Section 409 forms part of a comprehensive federal plan to promote highway and railway safety. *Wiedeman, supra*. Although there is very little legislative history regarding 23 U.S.C. § 409, courts have surmised that

section 409 was enacted to encourage candid evaluation and correction of highway and railway safety hazards by shielding the process from the roving eyes of tort litigants. As noted by the supreme court in *Reichert v. State, Department of Transporation and Development*, 96-1419 (La.05/20/97), 694 So.2d 193, 197, by enacting section 409, Congress intended to "[f]oster the free flow of safety-related information by precluding the possibility that such information later would be admissible in civil suits. The interest to be served by such legislation is to obtain information with regard to the safety of roadways free from the fear of future tort actions." (Citations omitted).

In addition, the statute has been considered to prohibit federally required record-keeping from being used as a tool in private litigation. *See Palacios v. Louisiana and Delta R.R. Inc.*, 98-2932 (La.07/02/99), 740 So.2d 95, 98.

In its present form, 23 U.S.C. § 409 provides that:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying, evaluating or planning the safety enhancement of potential accident sites, hazardous roadway conditions or railway-highway crossings, pursuant to sections 130, 144 and 152 of the title or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceedings or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

(As amended Nov. 28, 1995, P.L. 104-59, Title III, § 323, 109 Stat. 591).[4]

In *Reichert, supra* at 197, the Louisiana Supreme Court held that section 409 bars discovery and introduction into evidence of all highway safety information collected or compiled by the State for the purpose of obtaining federal funds to enforce safety. The scope of the privilege afforded by this statute was most recently addressed by the supreme court in *Palacios, supra*.[5] In Palacios, the court held that to be protected by section 409, the information in question must be:

(1) reports, surveys, schedules, lists or data,

(2) compiled or collected,

(3) for the purpose of identifying, evaluating, or planning the safety enhancement of potential

---

[4] As originally written, § 409 prevented only the admission into evidence of the documents and data specifically described in the statute. In 1991, the statute was amended to preclude also the discovery of such information. Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978. Section 409 was amended again in 1995 to extend the privilege to data "collected" as well as "compiled." Pub.L. 104-59, Title III, § 323, Nov. 29, 1995, 109 Stat. 591.

[5] The matter before the court in *Palacios, supra*, involved an accident at a railway crossing; therefore, the court's discussion focused on that portion of § 409 dealing with 23 U.S.C. § 130, the Railway-Highway Crossing Program. Nonetheless, the four-part analysis employed by the court in Palacios merely tracks the language of section 409 and is therefore applicable to sections 144 and 152, which concern the Highway Bridge Replacement and Rehabilitation Program and the Highway Hazard Elimination Program, as well as to the latter portion of the statute which protects data assembled for highway safety construction improvement projects which utilize federal funds.

> accident sites, hazardous roadway conditions, or railway-highway crossings,
>
> (4) pursuant to sections 130, 144 and 152 of the title or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds.

The court in Palacios went on to note that not all documents and information in the state's possession are privileged under § 409. It is only those records that are amassed pursuant to the federal programs described in 23 U.S.C. §§ 130, 144 and 152 or for the purpose of developing other highway safety improvement projects which may be federally funded that are protected. As stated by the court:

> The plaintiff is at liberty to investigate, examine and present other relevant evidence, so long as such evidence was not compiled or collected for purposes of federal highway improvement programs. Moreover, our ruling does not preclude the testimony of experts, eyewitnesses, or others, so long as that testimony is not based upon privileged documents or information. As this court previously noted in Reichert, the plaintiff has not been deprived of her cause of action – she "merely cannot rely upon the DOTD for [her] discovery."
>
> (Emphasis added).

Palacios, 740 So.2d at 102.

Analysis

With the above legal precepts in mind, we will examine the trial court's ruling, addressing respectively plaintiffs' specific assignments of error.

Accident Reports

According to plaintiffs, the trial court's ruling erroneously prohibited them from deposing individuals who were involved in or who investigated several accidents which, like the Dowell accident, occurred at or near the intersection while construction was in progress. Plaintiffs concede that they became aware of the identity of these individuals from copies of accident reports they obtained from the Shreveport Police Department.

Defendants, on the other hand, assert that because plaintiffs learned of the identity of these persons from accident reports, which they contend are within the protective scope of 23 U.S.C. § 409, plaintiffs are prohibited from deposing these individuals. They further claim that these accidents, as well as the Dowell accident, were considered in their decision to revise the planned construction project by moving the intersection further west.

The logical conclusion of defendants' argument is that the investigating officers and witnesses to these accidents, including the Dowell accident, could not be deposed or allowed to testify at trial. Such a result would be absurd.

We point out that plaintiffs are seeking neither to discover from defendants nor introduce into evidence such reports. Instead, they are simply trying to depose individuals, witnesses and officers about accidents at or

near the location of the Dowell accident to determine whether they are similar enough to be considered relevant.

Under Louisiana law these depositions are proper. Where an intrusion into an area traditionally left to the states occurs, Congress's intent to preempt must be clear. As noted by the supreme court in *Wiedeman, supra,* because preemption of state law is never presumed, section 409 will be construed and applied restrictively to prohibit only what is specifically proscribed. In *Palacios, supra,* the court held that testimony not based on privileged documents but on personal observation is not precluded. Clearly, plaintiffs are not relying on DOTD or the City for their discovery. *See Palacios, supra* at 107.

Having found no legal basis for extending the scope of § 409 to prevent plaintiffs from deposing individuals who were involved in, witnessed or investigated other accidents which occurred at or near the site of the Dowell accident, we thus reverse that portion of the trial court's order prohibiting such discovery.

Correspondence

Plaintiffs' second assignment of error is that the trial court erred in prohibiting them from taking the depositions of authors of correspondence between the City and DOTD, as well as letters written by concerned citizens to these governmental entities over the past ten years. Plaintiffs also seek to introduce copies of these letters which they obtained from sources other than defendants.

As noted above, § 409 precludes from discovery and admission into evidence any report, survey, schedule, list

or data collected or compiled for developing any highway safety construction improvement which may be implemented or supported with federal funds. Correspondence between the DOTD and the City as well as letters received by these agencies are such data and therefore are neither discoverable nor admissible. *Reichert, supra; Fry v. Southern Pacific Transportation Co.*, 30,540 (La.App.2d Cir.06/24/98), 715 So.2d 632; *Miller v. Bailey*, 621 So.2d 1174 (La.App. 3d Cir.1993); *Rodenbeck v. Norfolk & Western Railway Co.*, 982 F.Supp. 620 (N.D.Ind.1997).

Likewise, testimony from government employees regarding such correspondence is barred by section 409; however, citizens who have personal knowledge concerning relevant events may be deposed even though they may have written these agencies concerning the safety of this intersection. *See Palacios, supra.*

Inspection Reports and Construction Diaries

Finally, plaintiffs take issue with that part of the trial court's ruling regarding inspection reports and construction diaries which purportedly show the daily placement of barrels and/or barricades at the intersection during construction.

In their petitions, plaintiffs allege that the accident was caused by negligent management or mismanagement of traffic during construction. In particular, that the placement of signs and the configuration of construction barrels and/or barricades created a visual obstruction for Robert Dowell, Jr., who was unable to see oncoming traffic without pulling his vehicle into the intersection. Therefore, evidence regarding the placement, positioning and movement of the barrels and/or barricades is critical

to plaintiffs' ability to prove that these barriers were improperly or negligently employed.

We agree with plaintiffs that these documents, which did not even come into existence until after federal funding had been obtained and the project had begun, are not protected from discovery by 23 U.S.C. § 409. Quite simply, inspection reports and construction diaries maintained by non-governmental defendants during an ongoing project do not meet the statute's requirement of information which is compiled or collected for any of the purposes set forth in section 409. The trial court erred in finding otherwise.

Conclusion

For the reasons set forth above, we find that the trial court was correct in granting defendants' motions for protective order regarding correspondence to and from the City and the State, as well as letters written by concerned citizens to these government defendants based upon the finding that these documents are privileged under 23 U.S.C. § 409. That portion of the trial court's judgment is AFFIRMED.

We find error, however, that part of the judgment prohibiting plaintiffs from deposing individuals with personal knowledge (which may include citizens who have written letters to defendants) or experts whose views are based on unprivileged documents or information. We further find error in the prohibition of the taking of depositions of persons involved in prior accidents at the site of the Dowell accident and the protection of documents regarding the placement of construction barricades

and/or barrels at the site of the accident. Thus, that part of the trial court's judgment is REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

ROBERT DOWELL, SR., ET AL	*	NUMBER: 428,953
VERSUS	*	FIRST JUDICIAL DISTRICT COURT
THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF DEVELOPMENT, ET AL	*	CADDO PARISH, LOUISIANA
PERMANENT ASSIGNMENT	*	SECTION "B"
	*	(Filed Aug. 4, 1999)

CONSOLIDATED WITH

DEBRA MARIE BELL ON BEHALF OF THE ESTATE OF HER MINOR CHILD, DEVON DOWELL-THOMAS	*	NUMBER: 429,954
VERSUS	*	FIRST JUDICIAL DISTRICT COURT
PLAQUEMINE CONTRACTING CORPORATION, ET AL	*	CADDO PARISH, LOUISIANA
PERMANENT ASSIGNMENT	*	SECTION "B"

The case at bar arose from a two vehicle accident that occurred on July 11, 1997 when Robert Dowell Jr., and Devon Dowell-Thomas were leaving Hamel's Amusement Park and crossing East 70th Street onto the Clyde

Fant Parkway and collied [sic] with a vehicle being operated by Robby H. McGee. As a result of the accident Devon Dowell-Thomas was pronounced dead upon arrival at LSU Medical Center, and Robert Dowell, Jr., died eight (8) months later from injuries he received as a result of the accident.

Now the plaintiffs, Robert Dowell, Sr., and minor child Quontavius Tre'Veon Dowell, and the defendant, the City of Shreveport are in dispute about several documents. The plaintiffs propounded Interrogatories to the defendant and Request for Production of Documents. The defendant contends it has answered said Interrogatories and Request for Production of Documents as best it can according to it's knowledge and applicable law.

The plaintiff contends that they need accident reports of persons who were involved in prior similar accidents at the same intersection in which Dowell and McGee vehicles collide. The plaintiff's want to take depositions of the people who got hurt in a similar fashion as the Dowell accident. Also, the plaintiff request [sic] letters generated among the defendants over the past ten years regarding the intersection where the accident occurred. They, the plaintiffs, want to depose the authors of these letters to establish knowledge and to demonstrate that complaints were being made about the intersection and that notice was given to the defendants. Finally, the plaintiffs want to inspect reports and construction diaries.

The defendant, City of Shreveport, contends that the accident reports, and construction diaries requested by the plaintiffs were protected by 23 U.S.C. § 409 are irrelevant pursuant to La. Code of Evidence Art. 402.

The U. S. Congress enacted the Surface Transportation and Uniform Relocation Assistance Act in 1987. This Act amended the Highway Safety Act by adding Title 23 to the United States Code. Title 23 was established to promote safety in roadway conditions or railway-highway crossings. Title 23 offers Federal Funds to improve roadways with the conditioning that the individual states and municipalities. These responsibilities include, but are not limited to, conducting surveys and performing intersection studies. Title 23 U.S.C. § 409 was enacted and amended to its present form to aid the States in conducting the surveys and studies by protecting the integrity of the system and in turn protecting the general public.

23 U.S.C. A § 409 reads a [sic] follows:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railroad-highway crossings pursuant to section [sic] 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal aid highway funds should not be subject to discovery or admitted into evidence in a Federal or State Court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or date."

The meaning and intent of the statute is clear. Where federal funds may be used to develope [sic] a highway safety, construction

> improvement project, all information compiled or collected is non-discoverable and is inadmissible into evidence in a Federal or State court proceeding which results from any action at a location mentioned.
>
> In *Miguez vs. Southern Pacific Transportation Company,* 645 So.2d 1184 (10/5/94) rehearing denied December 14, 1994, the Third Circuit Court of Appeal interpeted [sic] 23 U.S.C.A. § 409 as follows:
>
> "That statute is very strict as to the discoverability and admissibility of evidence in these types of cases. The statute is clearly preemptive and it must be strictly construed to prohibit only what is expressly proscribed."

The Louisiana Supreme Court enumerated what the basic objectives of the Louisiana discovery process are.

"The basic objectives of the Louisiana discovery process are (1) to afford all parties a fair opportunity to obtain facts pertinent to the litigation, (2) to discover the true facts and compel disclosure of these facts wherever they may be found, (3) to assist litigants in preparing their cases for trial, (4) to narrow and clarify the basic issues between the parties, and (5) to facilitate and expedite the legal process by encouraging settlement or abandonment of less than notorious claims.

State vs. Spruell, 543 La. 202, 142 So.2d 596 (1962). *Bennett vs. General Motors Corp.,* 420 So.2d 531 (La. App. 2nd Cir. 1982)."

"Despite the State's substantial interest, § 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. Art.

VI cl. 2; *Jones vs. Rath Packing, Co.*, 430 U.S. 519, 525 97 S. Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel*, 607 So.2d 549 (La. 1992). See also *Claspill v. Missouri Pacific Railroad Co.*, 793 S. W. 2d 139, 140 (Mo. Banc 1990)." 627 So.2d at 172.

The Louisiana Supreme Court holding in *Reichert v. State DOTD*, 694 So.2d 193 (La. 1997), ended all confusion among the circuits regarding the application of 23 U.S.C. § 409. The court in *Reichert*, supra, held that § 409 bars both the discovery and the introduction into evidence of all highway safety information collected or compiled by the City for the purpose of obtaining federal funds and to enforce safety. The particular wording "compiled or collected" purposely eliminates the admissibility of "all reports, traffic courts, and other raw data collected by the department." *Reichert* citing *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170 (La. 1993). Specifically, the Court stated that "raw data compiled prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in an [sic] federal or state court proceeding or considered for other purposes for any action for damages arising from any occurrence at a location mentioned or addressed in such data." 694 So.2d at 198. 23 U.S.C. § 409 now and has always excluded from discovery and admissibility raw data "compiled or collected." The *Reichert* court went on to state that no exhibits collected to make a decision for highway enhancement can be introduced. 694 So.2d at 198. Thus, the accident reports of others and construction diaries are protected.

As for the letters generated among the defendants the plaintiffs contend that through there own investigation discovered a collection of letters that were transmitted to various defendants in this case. The plaintiffs further contend that the information is admissible to the extent that it shows knowledge on the part of the defendants and there has been no proof submitted by any of the defendants that these letters were compiled and collected for the purpose of obtaining federal funding.

However, this Court agrees with *Miller v. Bailey*, 621 So.2d 1174 (La. App. 3 Cir.), writ denied, 629 So.2d 558 (La. 1993); *Rodenbeck v. Norfolk & Western Railways Co.*, 982 F. Supp. 620 (N.D. Ind. 1997). "In that the jurisprudence additionally indicated that correspondence on such topics, even from non-government sources are neither discoverable nor admissible".

As that the correspondence itself would not be subject to discovery, witnesses are not allowed to circumvent 23 U.S.C. § 409 by testifying regarding contents of an inadmissible report. In *Harrison vs. Burlington Northern Railroad Co.*, 956, F. 2d. 155 (7th Cir. (Ill) 1992) wherein the court noted that allowing the witnesses to testify as to the content of letters would have circumvented the purposes of 23 U.S.C. § 409. *Stephens v. Jonesboro*, 642 So.2d 274 (La. App. 2d Cir. 1994) held that when a contract involving highway safety improvement is not discoverable.

For the foregoing reasons IT IS ORDERED, ADJUDGED, And DECREED that defendants Motion for Protective Order regarding accident reports occurring at the cite of the Dowell accident, the letters generated amongst the defendants concerning the intersection

where the accident occurred and the construction diaries and reports is hereby GRANTED.

Shreveport, Caddo Parish, Louisiana on this the 28th day of July, 1999.

/s/ John Mosely, Jr.
JOHN MOSELY, JR.
DISTRICT JUDGE

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ATTEST
A TRUE COPY

/s/ C. Bryant
CADDO PARISH
DEPUTY CLERK

APPENDIX C

Robert DOWELL, Sr., et al,

v.

The STATE of Louisiana Through the Department of Transportation and Development et al, Consolidated with Debra Marie Bell on Behalf of the Estate of Her minor Child Devon Dowell-Thomas.

v.

PLAQUEMINE CONTRACTING CORP., et al.

No. 2000-CC-0685.

Supreme Court of Louisiana.

April 20, 2000.

****1 IN RE:** Louisiana, State of; Department of Transportation and Development; – Defendant(s); Applying for Supervisory and/or Remedial Writs, Parish of Caddo, 1st Judicial District Court Div. G, Nos. 428,953, 429,954; to the Court of Appeal, Second Circuit, No(s). 33,095-CW, 33,094-CW.

Denied.

MARCUS, J., not on panel.

APPENDIX D

23 U.S.C. § 402. Highway safety programs

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform guidelines promulgated by the Secretary. Such uniform guidelines shall be expressed in terms of performance criteria. In addition, such uniform guidelines shall include programs (1) to reduce injuries and deaths resulting from motor vehicles being driven in excess of posted speed limits, (2) to encourage the proper use of occupant protection devices (including the use of safety belts and child restraint systems) by occupants of motor vehicles and to increase public awareness of the benefit of motor vehicles equipped with airbags, (3) to reduce deaths and injuries resulting from persons driving motor vehicles while impaired by alcohol or a controlled substance, (4) to prevent accidents and reduce deaths and injuries resulting from accidents involving motor vehicles and motorcycles, (5) to reduce injuries and deaths resulting from accidents involving school buses, and (6) to improve law enforcement services in motor vehicle accident prevention, traffic supervision, and post-accident procedures. The Secretary shall establish a highway safety program for the collection and reporting of data on traffic-related deaths and injuries by the States. Under such program, the States shall collect and report such data as the Secretary may require. The purposes of the program are to ensure national uniform data on such deaths and injuries and to allow the Secretary to make determinations for use in developing programs to reduce

such deaths and injuries and making recommendations to Congress concerning legislation necessary to implement such programs. The program shall provide for annual reports to the Secretary on the efforts being made by the States in reducing deaths and injuries occurring at highway construction sites and the effectiveness and results of such efforts. The Secretary shall establish minimum reporting criteria for the program. Such criteria shall include, but not be limited to, criteria on deaths and injuries resulting from police pursuits, school bus accidents, and speeding, on traffic-related deaths and injuries at highway construction sites and on the configuration of commercial motor vehicles involved in motor vehicle accidents. Such uniform guidelines shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve pedestrian performance and bicycle safety. In addition such uniform guidelines shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, enforcement of light transmission standards of window glazing for passenger motor vehicles and light

trucks as necessary to improve highway safety, and emergency services. Such guidelines as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations.

(b) Administration of State programs. –

(1) Administrative requirements. – The Secretary may not approve a State highway safety program under this section which does not –

(A) provide that the Governor of the State shall be responsible for the administration of the program through a State highway safety agency which shall have adequate powers and be suitably equipped and organized to carry out, to the satisfaction of the Secretary, such program;

(B) authorize political subdivisions of the State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program if such local highway safety programs are approved by the Governor and are in accordance with the minimum standards established by the Secretary under this section;

(C) except as provided in paragraph (3), provide that at least 40 percent of all Federal funds apportioned under this section to the State for any fiscal year will be expended by the political subdivisions of the State, including Indian tribal governments, in carrying out local highway safety programs authorized in accordance with subparagraph (B); and

(D) provide adequate and reasonable access for the safe and convenient movement of individuals with disabilities, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks throughout the State.

(2) Waiver. – The Secretary may waive the requirement of paragraph (1)(C), in whole or in part, for a fiscal year for any State whenever the Secretary determines that there is an insufficient number of local highway safety programs to justify the expenditure in the State of such percentage of Federal funds during the fiscal year.

(3) Use of technology for traffic enforcement. – The Secretary may encourage States to use technologically advanced traffic enforcement devices (including the use of automatic speed detection devices such as photoradar) by law enforcement officers.

[(4), (5) Redesignated (2), (3)]

(c) Funds authorized to be appropriated to carry out this section shall be used to aid the States to conduct the highway safety programs approved in accordance with subsection (a), including development and implementation of manpower training programs, and of demonstration programs that the Secretary determines will contribute directly to the reduction of accidents, and deaths and injuries resulting therefrom. Such funds shall be subject to a deduction not to exceed 5 per centum for the necessary costs of administering the provisions of this section, and the remainder shall be apportioned among the several States. Such funds shall be apportioned 75 per centum in the ratio which the population of each State bears to the total population of all the States, as shown by

the latest available Federal census, and 25 per centum in the ratio which the public road mileage in each State bears to the total public road mileage in all States. For the purposes of this subsection, a "public road" means any road under the jurisdiction of and maintained by a public authority and open to public travel. Public road mileage as used in this subsection shall be determined as of the end of the calendar year preceding the year in which the funds are apportioned and shall be certified to by the Governor of the State and subject to approval by the Secretary. The annual apportionment to each State shall not be less than one-half of 1 per centum of the total apportionment, except that the apportionment to the Secretary of the Interior shall not be less than three-fourths of 1 percent of the total apportionment and the apportionments to the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands shall not be less than one-quarter of 1 per centum of the total apportionment. The Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. For the purpose of the seventh sentence of this subsection, a highway safety program approved by the Secretary shall not include any requirement that a State implement such a program by adopting or enforcing any law, rule, or regulation based on a guideline promulgated by the Secretary under this section requiring any motorcycle operator eighteen years of age or older or passenger eighteen years of age or older to wear a safety helmet when operating or riding a motorcycle on the streets and highways of that State. Implementation of a highway safety

program under this section shall not be construed to require the Secretary to require compliance with every uniform guideline, or with every element of every uniform guideline, in every State. Funds apportioned under this section to any State, that does not have a highway safety program approved by the Secretary or that is not implementing an approved program, shall be reduced by amounts equal to not less than 50 per centum of the amounts that would otherwise be apportioned to the State under this section, until such time as the Secretary approves such program or determines that the State is implementing an approved program, as appropriate. The Secretary shall consider the gravity of the State's failure to have or implement an approved program in determining the amount of the reduction. The Secretary shall promptly apportion to the State the funds withheld from its apportionment if he approves the State's highway safety program or determines that the State has begun implementing an approved program, as appropriate, prior to the end of the fiscal year for which the funds were withheld. If the Secretary determines that the State did not correct its failure within such period, the Secretary shall reapportion the withheld funds to the other States in accordance with the formula specified in this subsection not later than 30 days after such determination.

(d) All provisions of chapter 1 of this title that are applicable to National Highway System highway funds other than provisions relating to the apportionment formula and provisions limiting the expenditure of such funds to the Federal-aid systems, shall apply to the highway safety funds authorized to be appropriated to carry

out this section, except as determined by the Secretary to be inconsistent with this section, and except that the aggregate of all expenditures made during any fiscal year by a State and its political subdivisions (exclusive of Federal funds) for carrying out the State highway safety program (other than planning and administration) shall be available for the purpose of crediting such State during such fiscal year for the non-Federal share of the cost of any project under this section (other than one for planning or administration) without regard to whether such expenditures were actually made in connection with such project and except that, in the case of a local highway safety program carried out by an Indian tribe, if the Secretary is satisfied that an Indian tribe does not have sufficient funds available to meet the non-Federal share of the cost of such program, he may increase the Federal share of the cost thereof payable under this Act to the extent necessary. In applying such provisions of chapter 1 in carrying out this section the term "State transportation department" as used in such provisions shall mean the Governor of a State for the purposes of this section.

(e) Uniform guidelines promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate.

(f) The Secretary may make arrangements with other Federal departments and agencies for assistance in the preparation of uniform guidelines for the highway safety programs contemplated by subsection (a) and in the administration of such programs. Such departments

and agencies are directed to cooperate in such preparation and administration, on a reimbursable basis.

(g) Nothing in this section authorizes the appropriation or expenditure of funds for (1) highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into guidelines) or (2) any purpose for which funds are authorized by section 403 of this title.

[**(h)** Repealed. Pub. L. 97-35, Title XI, § 1107(c), Aug. 13, 1981, 95 Stat. 626]

(i) Application in Indian country. –

(1) Use of terms. – For the purpose of application of this section in Indian country, the terms "State" and "Governor of a State" include the Secretary of the Interior and the term "political subdivision of a State" includes an Indian tribe.

(2) Expenditures for local highway programs. – Notwithstanding subsection (b)(1)(C), 95 percent of the funds apportioned to the Secretary of the Interior under this section shall be expended by Indian tribes to carry out highway safety programs within their jurisdictions.

(3) Access for individuals with disabilities. – The requirements of subsection (b)(1)(D) shall be applicable to Indian tribes, except to those tribes with respect to which the Secretary determines that application of such provisions would not be practicable.

(4) Indian country defined. – In this subsection, the term "Indian country" means –

(A) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent and including rights-of-way running through the reservation;

(B) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a State; and

(C) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments.

(j) Rulemaking proceeding. – The Secretary may periodically conduct a rulemaking process to identify highway safety programs that are highly effective in reducing motor vehicle crashes, injuries, and deaths. Any such rulemaking shall take into account the major role of the States in implementing such programs. When a rule promulgated in accordance with this section takes effect, States shall consider these highly effective programs when developing their highway safety programs.

(k)(1) Subject to the provisions of this subsection, the Secretary shall make a grant to any State which includes, as part of its highway safety program under section 402 of this title, the use of a comprehensive computerized safety recordkeeping system designed to correlate data regarding traffic accidents, drivers, motor vehicles, and roadways. Any such grant may only be used by such State to establish and maintain a comprehensive computerized traffic safety recordkeeping system or to obtain and operate components to support highway safety priority programs identified by the Secretary

under this section. Notwithstanding any other provision of law, if a report, list, schedule, or survey is prepared by or for a State or political subdivision thereof under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

(2) No State may receive a grant under this subsection in more than two fiscal years.

(3) The amount of the grant to any State under this subsection for the first fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1985 under this section. The amount of a grant to any State under this subsection for the second fiscal year such State is eligible for a grant under this subsection shall equal 10 per centum of the amount apportioned to such State for fiscal year 1986 under this section.

(4) A State is eligible for a grant under this subsection if –

(A) it certifies to the Secretary that it has in operation a computerized traffic safety recordkeeping system and identifies proposed means of upgrading the system acceptable to the Secretary; or

(B) it provides to the Secretary a plan acceptable to the Secretary for establishing and maintaining a computerized traffic safety recordkeeping system.

(5) The Secretary, after making the deduction authorized by the second sentence of subsection (c) of this section for fiscal years 1985 and 1986, shall set aside 10

per centum of the remaining funds authorized to be appropriated to carry out this section for the purpose of making grants under this subsection. Funds set aside under this subsection shall remain available for the fiscal year authorized and for the succeeding fiscal year and any amounts remaining unexpended at the end of such period shall be apportioned in accordance with the provisions of subsection (c) of this section.